Nos. 11,581 and 11,772

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. DAGGS, *Appellant,* vs. GROVER C. KLEIN, Rear Admiral, United States Navy, Commandant, Mare Island Navy Yard and JAMES V. FORRESTAL, Secretary of the Navy, *Appellees.*	No. 11,581
JOHN BRAITO, *Appellant,* vs. GROVER C. KLEIN, Rear Admiral, United States Navy, Commandant, Mare Island Navy Yard and JAMES V. FORRESTAL, Secretary of the Navy, *Appellees.*	No. 11,772

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

In this brief we will consider only such points as are raised in the brief for appellee. We will not rediscuss any points made by us in our opening briefs which the brief for appellee fails to consider.

I.

THERE IS A FEDERAL QUESTION HERE.

The first point made by appellee is that there is no justiciable federal question presented here. (Brief for Appellee, pp. 4-5.) In support of this position appellee first cites the dissenting opinion in *Bell v. Hood,* 327 U. S. 678, and then seeks to distinguish the majority opinion in that case. Insofar as reliance is placed upon the dissenting opinion we respectfully submit that this Court is bound to follow the mandate of the majority of the Supreme Court. Insofar as an attempt is made to distinguish *Bell v. Hood,* we respectfully submit that it fails. In our opening brief in the *Daggs* case, we discussed *Bell v. Hood* at some length (pp. 32-39.) This case was originally cited by Judge St. Sure in his memorandum opinion on his order dismissing the complaint in the *Daggs* case as a decision of this Circuit Court in support of the proposition that no federal question was presented. (Daggs, Tr. p. 17.) We discussed *Bell v. Hood* at some length for two reasons: (1) because the decision of this Circuit was reversed by the Supreme Court thereby indicating that at least one of the authorities upon which Judge St. Sure relied was no longer valid, and (2) because the facts and opinion in *Bell v. Hood* were so closely analogous to the case at bar. The question involved in both the case at bar and *Bell v. Hood* was whether or not violations of constitutional and statutory rights by federal officials gave rise to a federal justiciable question. The decision in *Bell v. Hood,* which we

respectfully submit is binding upon this Court, was that they did.

II.

The next point made by the appellee is that the District Court had no jurisdiction over the Secretary of the Navy. This matter has been fully discussed by us in the *Daggs* brief at pages 46 to 48, and in the *Braito* brief at pages 15 and 16, and since the appellees raise no points which were not considered in those portions of our briefs we will not repeat the argument here.

III.

THE SECRETARY OF THE NAVY IS NOT AN INDISPENSABLE PARTY.

The next point made by the appellee is that the Secretary of the Navy is an indispensable party to the action. Here, too, the appellants' position is stated in some detail in the opening briefs. (Daggs brief, pp. 48-51; Braito brief, pp. 9-16.)

The only authority cited in appellee's brief is *Williams v. Fanning,* 332 U. S. 490. Appellee quotes certain language from that opinion but neglects to analyze the case and state precisely what was the holding. Such an analysis and examination would probably be embarrassing to the appellee's position because if *Williams v. Fanning* stands for anything it stands for the proposition that *Neher v. Harwood,* 128 Fed. (2d) 846 (C.C.A. 9), *has been overruled.*

The clear and unequivocal overruling of *Neher v. Harwood* by the *Williams* case is apparent upon examining the record. This Court decided the *Williams* case *per curiam* with the following opinion:

> "Upon the authority of Neher v. Harwood, 9 Cir., 128 F.2d 846, 158 A.L.R. 1116, the judgment in this case is affirmed." (158 F. (2d) 95.)

Neher v. Harwood is the case in this Circuit which had held that in the postal fraud cases the Postmaster General was an indispensable party *and was the only case upon which Judge Goodman relied in dismissing the complaint in the Braito case.* (Daggs, Tr., pp. 27-28.)

We discussed *Neher v. Harwood* at some length in our opening brief in the *Braito case* (pp. 9-16), but we unfortunately did not have before us at the time that brief was written the Supreme Court's decision in *Williams v. Fanning.* It now appears that the Supreme Court has come to the same conclusion that we did with respect to this matter of the indispensability of the Postmaster General in these suits.

The reversal by the Supreme Court of the rule of *Neher v. Harwood,* in the *Williams* case, was clearly the result of a realistic appraisal by the Supreme Court that the decree, in order to be effective, need not require the Postmaster General to do a single thing; that no concurrence on his part was necessary for his subordinate to carry out the mandate of the Court; that under the mandate of the Court the

subordinate not only could, but would be expected to, take action to afford the relief prayed for.

Here, too, there is no question but what the Commandant of the Navy Yard can afford the relief prayed for. The Commandant, not the Secretary, employs persons in a Civil Service capacity. (Cf. *Murphy v. United States,* 79 Fed. 255 (C.C.A. 9).) The Commandant, not the Secretary, compensates employees for services rendered. The Commandant, not the Secretary, pays accrued leave. To hold that merely because the Secretary is mentioned in the statute, despite the fact that the Commandant is the one who actually operates the Navy Yard, the Secretary is thereby an indispensable party is to indulge in a tenuous and highly technical line of thinking, the net effect of which is to deprive appellants and others similarly situated of any relief from the arbitrary acts not of the Secretary but of the Commandant himself.

For as we tried to make clear in the *Braito* brief (pp. 11-12), *it is the subordinate officer* (*the Commandant*) *who failed to carry out the statutory duty imposed upon* HIM. In connection with the "full disclosure" provisions of the statute *the Congressional obligation was placed upon the subordinate officer and not upon the Secretary.*

Certainly the subordinate officer cannot fail to comply with the Congressional duty which is imposed upon him and then, when he is asked to account in a Federal District Court for his failure so to do,

hide behind the Secretary who in turn contends that he cannot be sued anywhere except in the District of Columbia. If such a contention is accepted by this Court it will in effect be reading out of the statute, the Congressional mandate that the discharged employee is entitled to be "fully informed" of the charges against him.

IV.

THERE IS NO QUESTION OF CONTROLLING "EXECUTIVE DISCRETION".

The next point made by the appellee is that the action seeks to control the exercise of a discretionary function. This point was discussed by us in both opening briefs. All the cases cited, save for one, have already been analyzed. (*Daggs* brief, pp. 51-56; *Braito* brief, pp. 12-13.)

The only new case cited by the appellee is *U. S. ex rel. Greathouse v. Dern,* 289 U.S. 352. This case is cited for the proposition that under "normal conditions" courts have declined to control discretionary executive functions particularly where to grant the relief sought would be an idle act. Whether or not the case stands for such a broad proposition, it is apparent that the proposition contains its own qualifications. For the reasons which have heretofore been advanced, this case is not one which may be regarded as "normal." We will not repeat the arguments with respect to the outrageous and shocking (and for the purpose of the motions to dismiss, ad-

mittedly true) violations of appellants' constitutional and statutory rights. Those, we think, are adequately covered in the briefs heretofore filed.

We will point out that in the *Greathouse* case the situation was quite different from that at bar. There was there involved an effort to compel the Secretary of War to construct a certain wharf on the Potomac River. There was a serious question of whether or not petitioner had any clearly vested right to have the wharf constructed. Here there is no question that appellants had a vested Civil Service status before the conduct complained of occurred. All appellants here are seeking is the redress of a wrong which destroyed their vested status. There is no question that they are entitled to that which they are seeking.

Furthermore, in the *Greathouse* case it appeared that the very public lands upon which petitioner sought to have the wharf constructed were being utilized by the government for park, recreational and driveway purposes. The Court pointed out that the only effect of constructing the wharf as petitioner desired would be to increase the expense to the government because it would be required to destroy the wharf after its construction in order to operate the parkway and recreational facilities. Thus on the facts, the *Greathouse* case looked suspiciously like an attempt to make a raid on the government treasury which the Court properly rejected. There is nothing remotely resembling that situation here. All the appellants have ever asked is that the provisions

of the statute applicable to them be followed by the officers involved.

Finally, in the *Greathouse* case the Court said:

> "* * * Thus the extraordinary remedy by mandamus, invoked to protect rights to which petitioners are not shown to be clearly entitled, would be burdensome to the government without any substantially equivalent benefit or advantage to the petitioners or their vendee, apart from the incidental and irrelevant consequence that petitioners might secure the performance of their conditional contract." (289 U.S. 360.)

Clearly, in the *Greathouse* case the act sought in view of the parkway construction would have been an idle act. That is not the case here. There is no indication that if the relief prayed for is granted it will not be effective and will not settle the rights of the appellants once and for all.

V.

The next point raised by the appellee is that the amount claimed is beyond the jurisdiction of the District Court and it is contended that the jurisdiction is exclusively in the Court of Claims. This point was discussed by us at some length in the *Daggs* brief (pp. 56-57), and we respectfully submit that nothing new has been added by the appellee which requires further comment at this time.

VI.

THE SUIT IS NOT ONE AGAINST THE UNITED STATES.

The last point raised by the appellee is that the suits are in fact suits against the United States. This point, too, has been discussed by us in the *Daggs* brief (pp. 57-62). *Trancontinental & Western Air v. Farley* is discussed by us at page 57 of the *Daggs* brief and it is clear that that case stands for the proposition that a Court may act when the officer's conduct is "not within the authority conferred." Certainly the discharges of the appellants without meeting the statutory conditions of fully informing them of the reasons for the discharges were not within the authority conferred.

The only new case cited on this point by the appellee is *Mine Safety Appliance Co. v. Forrestal,* 326 U.S. 371. This case involved an action against the Secretary of the Navy for an injunction and a declaratory judgment seeking to set aside that officer's determination that the petitioner had received excessive profits on war contracts and that government disbursing officers should withhold further funds under the Renegotiation Act. The dismissal below was affirmed on appeal.

As the opinion indicates, and as Mr. Justice Reed points out in his concurring opinion, the petitioner completely failed to exhaust its administrative remedy. The Renegotiation Act provided that any contractor aggrieved by the Secretary's determination might apply to the Tax Court for a *de novo* trial

and adjudication of the issue. This the petitioner failed to do, so that the conclusion could very well have been reached upon the ground that the petitioner failed to exhaust its administrative remedy. In the cases at bar, the pleadings show that the appellants have consistently sought relief from the officers charged and it was only after repeated refusals by said officers to provide relief that appellants applied to the District Court. (*Daggs,* Tr. 5-8; *Braito,* Tr. 16-21.)

It is true that Mr. Justice Black in delivering the opinion of the Court in the *Mine Safety Appliance Co.* case did say that the government was an indispensable party and that since it had not consented to be sued the complaint was properly dismissed. However, the distinction between the case and the one at bar is apparent. The Court pointed out that in the *Mine Safety Appliace Co.* case "the action which the *Secretary proposed to take is not a violation of any express command of Congress.*" In the cases at bar, of course, the action has already been taken, has been taken by a subordinate official, not by the Secretary, and is clearly a violation of the express command of Congress. This is all alleged in the pleadings and for the purposes of the motion to dismiss these allegations must be taken as true.

The Court pointed out in the *Mine Safety Appliance Co.* case that in effect the action was one to recover a debt from the United States government. It was in reality a suit upon a contract for sums due

the contractor from the government. Such an issue could not be litigated behind the government's back without its consent. In our cases the "essential nature and effect of the proceeding as it appears from the entire record" (*Ex parte New York,* 256 U.S. 490) indicates to the contrary.

The entire statutory scheme set up by 50 U.S.C. App. 1156 turns upon giving to the person involved (the appellants here) the opportunity personally "to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement or affidavits, or both, as he may desire to show why he should be retained and not removed." It certainly was not intended by Congress that the vested Civil Service rights, which had been built up over a period of many years as a result of loyal and faithful service to the government, should be destroyed in the manner in which those of these appellants were destroyed without giving to the appellants the opportunity to defend themselves and to present evidence to show why such action should not be taken. The failure of the subordinate officer designated by the Secretary to follow the Congressional mandate vitiates the entire proceeding and in our opinion compels, despite all tenuous and technical objections to the contrary, the Court below to grant the relief prayed for.

For the foregoing reasons, it is respectfully submitted that the judgments and orders below, and each of them, should be reversed.

Dated, San Francisco,
May 20, 1948.

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